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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

v.

IT CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, contrary to the holdings of seven other circuits, the Ninth Circuit correctly held that a contract service-provider is a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") when it merely performs initial claims-handling and check-writing services for an employee benefit plan under a framework of rules established by the plan's administrator.

2. Whether, contrary to the plain language of ERISA and the law in other circuits, the Ninth Circuit correctly held that a contract service-provider automatically becomes an ERISA "fiduciary" whenever it handles plan money or has check-writing authority to pay benefits.

PARTIES

The petitioner is General American Life Insurance Company ("General American"). The respondents are IT Corporation, IT Corporation Benefit Plan, and Harry Joseph Lukowski.

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioner states that GenAmerica Corporation is the parent of General American, and that General American Mutual Holding Company is the parent of GenAmerica Corporation. General American has the following subsidiary (other than wholly owned subsidiaries): Reinsurance Group of America, Incorporated.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. Factual Background	1
B. The Complaint	3
C. The District Court's Decision	3
D. The Ninth Circuit Decision	5
REASONS FOR GRANTING THE WRIT	6
1. A Contract Service-Provider Does Not Become a "Fiduciary" Merely by Engaging in Initial Claims-Processing and Payment Under Plan Rules	7
2. A Party Does Not Become a "Fiduciary" Automatically by Handling Plan Money and Having Check-Writing Authority	9
3. The Ninth Circuit's Decision Will Have Significant Adverse Impacts on Plans	10
I. THE NINTH CIRCUIT'S DECISION THAT A PARTY MERELY PERFORMING INITIAL CLAIMS-PROCESSING AND PAYMENT IS A FIDUCIARY SHARPLY DEPARTS FROM THE CORRECT, COMMON-SENSE RULE FOLLOWED BY SEVEN OTHER CIRCUITS	11

TABLE OF CONTENTS—Continued

Page

A. The Court Below Incorrectly Imposed Fiduciary Status on Parties Merely Engaged in Administrative, Ministerial Claims Activities 11

B. The Decision Conflicts With Decisions in All Other Circuits Which Have Considered the Issue 15

C. The Decision Ignores a Key Distinction Between Initial Claims-Handling and the Fiduciary Review of Denied Claims—the Only Fiduciary Function in the Claims Area.. 20

II. THE NINTH CIRCUIT'S DECISION THAT A PARTY WHICH HANDLES PLAN ASSETS OR HAS CHECK-WRITING AUTHORITY AUTOMATICALLY BECOMES A FIDUCIARY CONFLICTS WITH THE PLAIN LANGUAGE OF ERISA AND THE LAW IN OTHER CIRCUITS 22

III. THE DECISION BELOW, WHICH HAS AN IMPACT FAR BEYOND THE NINTH CIRCUIT, WARRANTS REVIEW BECAUSE IT OVERTURNS THE ACCEPTED DEFINITION OF "FIDUCIARY" FOR EVERY PLAN, THUS MAKING IT DIFFICULT FOR MILLIONS OF PLANS TO SECURE EXPERT CLAIMS-PROCESSING, AND SPURRING LITIGATION, ALL CONTRARY TO THE PUBLIC INTEREST 26

CONCLUSION 30

APPENDIX:

Opinion of the Court of Appeals, filed March 3, 1997 ..... 1a

Order of the District Court Granting Motion to Dismiss, filed May 24, 1994 ..... 13a

TABLE OF CONTENTS—Continued

	Page
Order of the Court of Appeals Denying Petition for Rehearing With Suggestion for Rehearing en Banc, filed June 23, 1997	17a
District Court Complaint, filed January 25, 1994	18a
IT Corp. Employee Medical Benefits Plan Document (without schedules)	22a
Administrative Services Agreement (without schedules)	25a
ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)	33a
ERISA § 402(a)(1), (b)(2), 29 U.S.C. § 1102(a)(1), (b)(2)	33a
ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1)	34a
ERISA § 412(a), 29 U.S.C. § 1112(a)	34a
ERISA § 503, 29 U.S.C. § 1133	36a
29 C.F.R. § 2509.75-8(D-2, -3)	37a
29 C.F.R. § 2560-503-1	39a
29 C.F.R. § 2580.412-4 and -6	46a

TABLE OF AUTHORITIES

CASES — Page

Arizona State Carpenters Pension Trust Fund v. Citibank (Arizona), —— F.3d ——, 1997 U.S. App. LEXIS 23587 8
Baker v. Big Star Division of the Grand Union Co., 893 F.2d 288 (11th Cir. 1989) 16, 17
Baxter v. C.A. Muer Corp., 941 F.2d 451 (6th Cir. 1991) 18
Blatt v. Marshall and Lassman, 812 F.2d 810 (2d Cir. 1987) 17
Bromenn Healthcare v. Northwestern National Life Insurance Co., 806 F. Supp. 799 (C.D. Ill. 1992) 19
Chapman v. Klemick, 3 F.3d 1508 (11th Cir. 1993) 25
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 6
Confer v. Custom Engineering Co., 952 F.2d 34 (3d Cir. 1991) 17
Crandon v. U.S., 494 U.S. 152 (1990) 25
Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 4
Custer v. Sweeney, 89 F.3d 1156 (4th Cir. 1996) .. 16
Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987) 9, 29
Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985) 15, 16
Geller v. County Line Automobile Sales, Inc., 86 F.3d 18 (2d Cir. 1996) 17, 24
Gibson v. Prudential Insurance Co. of America, 915 F.2d 414 (9th Cir. 1990) 16
Haidle v. Chippenham Hospital, Inc., 855 F. Supp. 127 (E.D.Va. 1994) 18
Harris Trust and Savings Bank v. Provident Life and Acc. Insurance Co., 57 F.3d 608 (7th Cir. 1995) 19
HealthSouth Rehabilitation Hospital v. American National Red Cross, 101 F.3d 1005 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2432 (1997) 18, 24
Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987) 19

TABLE OF AUTHORITIES—Continued

Page

Kerns v. Benefit Trust Life Insurance Co., 992 F.2d 214 (8th Cir. 1993) 19
Klosterman v. Western General Management, Inc., 32 F.3d 1119 (7th Cir. 1994) 19
Kyle Railways v. Pacific Admin. Services, Inc., 990 F.2d 513 (9th Cir. 1993) 4, 5, 15
Libby-Owens-Ford Co. v. Blue Cross & Blue Shield Mutual Of Ohio, 982 F.2d 1031 (6th Cir.), *cert. denied*, 510 U.S. 819 (1993) 16
Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 12, 23, 26
New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1996) 25
Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988) 16, 25
O'Toole v. Arlington Trust Co., 681 F.2d 94 (1st Cir. 1982) 16
Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 9, 29
Pohl v. National Benefits Consultants, Inc., 956 F.2d 126 (7th Cir. 1992) 19, 23
Santana v. Deluxe Corp., 920 F. Supp. 249 (D. Mass. 1996) 16
Snow v. Standard Insurance Co., 87 F.3d 327 (9th Cir. 1996) 28
Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993) 15, 19, 25
Walker v. National City Bank of Minneapolis, 18 F.3d 630 (8th Cir. 1994) 24

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1
29 U.S.C. § 1002(21)(A) 1, 3, 5, 6, 15, 22, 29
29 U.S.C. § 1102(a)(1) 1, 23, 24
29 U.S.C. § 1102(b)(2) 1, 23, 24
29 U.S.C. § 1105(c)(1) 1, 24
29 U.S.C. § 1109(a) 20, 28
29 U.S.C. § 1110(a) 5
29 U.S.C. § 1112(a) 1, 6, 9, 23

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 1132(a)(2)	3
29 U.S.C. § 1132(e)(1)	3
29 U.S.C. § 1133	1, 6, 11, 16, 21
29 U.S.C. § 1134	6
29 U.S.C. § 1135	6
29 C.F.R. § 2509.75-4	5
29 C.F.R. § 2509.75-8(D-2, 3)	*passim*
29 C.F.R. § 2560-503.1(g)	1, 7, 12, 21
29 C.F.R. § 2580.412-4	1, 7, 10, 23

MISCELLANEOUS

1996 FOSTER HIGGINS NATIONAL SURVEY OF EMPLOYER-SPONSORED HEALTH PLANS, 18-19	11, 27
D. BACON, S. PRATER, D. TUCKER, EMPLOYEE BENEFITS GUIDE § 7.04[6] (Matthew Bender & Co. 1996)	10, 13
F.A. BRODIE & J.D. GATTER, "When Are Claims Administrators ERISA Fiduciaries," PENSION & BENEFITS WEEK 7 (June 7, 1997)	9, 28
M.J. CANAN & W.D. MITCHELL, EMPLOYEE FRINGE AND WELFARE BENEFIT PLANS § 2.3 (West Publishing Co. 1996)	12
R. J. COOKE, ERISA PRACTICE AND PROCEDURE § 6.2 (Shepard's/McGraw Hill 2d Ed. 1996)	12
S.P. SEROTA, ERISA FIDUCIARY LAW, p. 153 (Bureau of National Affairs 1995)	12
STATISTICAL ABSTRACT OF THE UNITED STATES, p. 120 (116th ed. 1996)	11, 27

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner General American Life Insurance Company ("General American") respectfully submits that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 107 F.3d 1415, and is reprinted in the Appendix hereto as 1a to 12a. The court's denial of General American's petition for rehearing, with a suggestion for rehearing en banc, App. 17a, is unreported. The district court's opinion (App. 13a to 16a) is unreported.

JURISDICTION

The court of appeals' opinion was filed on March 7, 1997. A timely petition for rehearing, with a suggestion for rehearing en banc, was denied on June 23, 1997. This petition is being timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves §§ 3(21)(A), 402(a)(1), (b)(2), 405(c)(1), 412(a) and 503 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1002(21)(A), 1102(a)(1), (b)(2), 1105 (c)(1), 1112(a) and 1133, and 29 C.F.R. §§ 2509.75-8 (D-2, D-3), 2560.503-1, and 2580.412-4 and -6. The pertinent text of these statutes and regulations is set forth in the Appendix at 33a to 51a.

STATEMENT OF THE CASE

A. Factual Background

Respondent IT Corporation ("IT Corp.") sponsored a self-funded health care plan (the "Plan"). IT Corp. was

the "named" fiduciary, serving as Plan Administrator and ERISA claims review fiduciary. The Plan identified IT Corp. as the "Plan Administrator," stating that it "shall have the authority to construe and interpret the terms of the Plan, and resolve any disputes which may arise . . . including but not limited to eligibility for participation and claims for benefits." App. at 23a. Respondent Lukowski was a plan participant.

General American served as a third-party administrator for IT Corp. pursuant to an Administrative Services Agreement ("ASA") between the two companies. App. at 25a to 32a. The Plan and ASA did not delegate any fiduciary duty to General American, nor any power to construe or interpret the Plan.

The ASA required General American to perform various administrative tasks for IT Corp. which included verifying eligibility for coverage, preparing benefit checks, and sending them to IT Corp. for distribution. The ASA specified that General American was to perform its duties as "agent" of IT Corp.; that it was to "maintain Blanket Bond Coverage"; that it had "no power or authority" to act for IT Corp. other than as expressly granted in the ASA, or to "alter, modify, or waive" any of the Plan's terms and conditions; that it should consult with IT Corp. in claim matters that were beyond the ordinary; and that "[a]ll contested or doubtful claims' were to be referred to IT Corp. for its determination. Under the ASA, any claims "involved in legal action" should be turned over to IT Corp.; likewise, legal action to recover payments to or on behalf of ineligible individuals was left to IT Corp. Further, the ASA specified that General American "perform[ed] purely ministerial functions for [IT Corp.] within a framework of policies, interpretations, rules, practices and procedures made by [IT Corp.]," and that it should not "be considered the named fiduciary under the Plan." App. at 25a to 30a.

The ASA also stated that General American should use reasonable care and diligence in performing its duties for

IT Corp. Under the ASA's cross-indemnification agreements, General American agreed to indemnify IT Corp. for any loss, damages, and expenses resulting from dishonest, fraudulent, criminal acts, or acts of gross negligence by General American. In turn, IT Corp. agreed to indemnify General American for all loss, damage, and expense resulting from claims, demands or lawsuits brought against it in connection with its services, *except* any dishonest, fraudulent or criminal acts, or acts of gross negligence by General American. App. at 27a.

B. The Complaint

The district court complaint, filed by IT Corp., the Plan, and Mr. Lukowski, attempted to allege a single claim against General American for "breach of fiduciary duty" under ERISA. App. at 18a to 21a. After alleging in conclusory terms that General American was a "fiduciary," it averred that General American "failed to verify the eligibility" of a participant's child to participate in the Plan; that the child was too sick to meet the Plan's "late enrollee" requirement that he be "able to carry on the duties and activities of a person of similar age"; and that General American paid a substantial amount of uncovered claims—more than $600,000—allegedly with "plan assets" "in violation of the terms of [the] Plan, and of the [ASA]." App. at 19a to 20a.

C. The District Court's Decision

The district court, in a decision by Judge Stephen V. Wilson, treated General American's Rule 12(b)(6) motion to dismiss the complaint, in essence, as one for summary judgment, and granted it on the ground that General American was not a fiduciary under § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). The district court's jurisdiction was based upon §§ 502(a)(2) and (e)(1) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (e)(1). Gen-

eral American has not contended that it is immune from any suit under ERISA.[1]

Rejecting IT Corp.'s argument that General American was a "fiduciary," the district court relied on *Kyle Railways v. Pacific Admin. Services, Inc.*, 990 F.2d 513 (9th Cir. 1993). App. at 13a to 16a. In *Kyle*, the Ninth Circuit, like every other circuit to have considered the issue, held that a contract service-provider merely engaged in initial claims-handling and payment under plan rules is not an ERISA fiduciary. *Id.* at 516. In *Kyle*, as in the present case, the plan vested all discretionary authority in the employer; moreover, the ASA in *Kyle* required the service-provider to refer to the employer all discretionary claim questions. The *Kyle* employer sued it for breach of fiduciary duty in allegedly "exercis[ing] discretion not conferred" by the ASA and "paying claims not covered under the plan." *Id.* at 515-16. *Kyle* ruled that the service-provider's "alleged negligence in following the Plan does not change the fact that [it] was still obligated to *follow* the Plan and that [the *employer*] retained ultimate responsibility . . . for all claims." *Id.* at 516 (emphasis added). The Ninth Circuit held that the service-provider was not

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[1] General American believes that IT Corp., as Plan Administrator, is not without relief. IT Corp. can sue General American as a non-fiduciary for equitable relief to enforce the ASA's cross-indemnity provision which benefits both it and the Plan, if it truly thinks that benefits were paid without its approval. Section 502(a)(3) of ERISA authorizes a suit by a fiduciary to obtain "appropriate equitable relief . . . to enforce . . . the terms of the plan." ERISA's "written plan instrument" rule, which is one of ERISA's "core functional requirements," *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995), and which sets it apart from the law of trusts, requires that all plans be in writing, and be administered by their fiduciaries "in accordance with the documents and instruments governing the plan," §§ 402(a), 404(a)(1)(d). These written instruments plainly include the ASA as a "contract, or other instrument under which the plan is . . . operated," § 104(a)(1), (b)(4). It would be anomalous to conclude that the same Congress which *required* all plans be in writing, and *required* all fiduciaries to enforce their written terms, did not also intend § 502(a)(3) to provides the necessary civil enforcement mechanism.

given any discretionary authority by the employer under the ASA and therefore was not a "fiduciary." *Id.*

D. The Ninth Circuit Decision

The Ninth Circuit reversed the decision of the district court and ordered a remand. It began by observing that "fiduciary" status is determined based on what a party's duties are, not on how they are characterized in a contractual document, and that § 410(a) of ERISA, 29 U.S.C. § 1110(a), forbids any exculpatory provision which purports to relieve a fiduciary from fiduciary liability. App. at 4a to 5a. It failed to note, however, that ERISA allows an *employer* to agree to indemnify a fiduciary. 29 C.F.R. § 2509.75-4 ("Indemnification provisions which leave the fiduciary . . . liable but merely permit another party to satisfy [such] liability . . . are . . . not void under § 410(a)").

On the merits, the Ninth Circuit first held that although General American was *not* a "named fiduciary" (such as a plan administrator (§ 3(16)(A) of ERISA, 29 U.S.C. § 1002(16)(A)), it would be an "unnamed" fiduciary if its decisions about claims involved plan interpretation and judgment. It ruled that ERISA fiduciary functions under § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), would include any decision by General American on claims, apart from simply typing a treatment code number and treatment provider identification onto a computer screen for generation of a payment check, or a simple mathematical computation of benefits. It concluded, in essence, that any claims-handling work in the area of verifying eligibility for participation or benefits or any application of plan procedures would involve plan interpretation and *judgment* and thus create fiduciary status. App. a 5a to 10a. Second, the court held that General American's handling of "plan assets" or power to write checks in applying the plan's eligibility rules was authority or control over management of the plan or disposition of its assets within the meaning of § 3(21)(A), and thus automatically made it a fiduciary on that ground as well. App. at 10a to 12a.

The decision, by its own terms, applies across-the-board to all contract service-providers, including third-party administrators, commercial insurers, and claims agents, regardless of whether the decision is to approve or deny a claim, and to all persons who handle plan assets or have the power to write checks in acordance with the plan's rules. This would include even the plan sponsor's own employees if they engage in initial claims-processing and payment for a self-funded plan, as well as employees of Taft-Hartley trust funds. The decision thus touches *all* employee benefit plans.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision not only affects all employee benefit plans, but it falls in an area of ERISA fiduciary law involving an extraordinary volume of recent reported decisions nationwide. The decision creates a highly-significant conflict with the law of the seven other circuits which have considered the issue of fiduciary status of contract service-providers under § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). This will create especially acute problems for plans that operate on a multi-state basis. The decision also creates a needless dissonance between three central parts of the statute dealing with fiduciaries: § 3(21)(A); § 503, 29 U.S.C. § 1133 (the fiduciary claims review section); and § 412(a), 29 U.S.C. § 1112(a) (the plan assets and bonding section). In addition, it conflicts with the questions and answers and regulations of the Department of Labor, the federal agency charged with the interpretation and enforcement of ERISA pursuant to §§ 505 and 504, 29 U.S.C. §§ 1135, 1134. The Department's questions and answers and regulations brilliantly harmonize these three statutory sections. Its construction of ERISA, moreover, is entitled to considerable weight. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

The decision errs on two very siginficant, recurring issues of statutory construction involving ERISA fiduciary status under § 3(21)(A). First, it held that a contract

service-provider merely performing initial claims-handling and payment under plan eligibility rules is an ERISA "fiduciary" despite the employer's retention of authority over plan interpretation and disputes involving eligibility, such retention being a common plan characteristic. Second, it held that a party becomes an ERISA "fiduciary" automatically by reason of the handling of plan money or check-writing authority under the plan's rules.

1. ***A Contract Service-Provider Does Not Become a "Fiduciary" Merely by Engaging in Initial Claims-Processing and Payment Under Plan Rules.***

By holding that an archetypal contract service-provider is a "fiduciary" if it merely performs day-to-day, initial claims-handling and payment, including the application of plan eligibility rules, the Ninth Circuit's decision conflicts with the rule followed by seven other circuits. It also conflicts with the Department of Labor's 1975 "safe-harbor" questions and answers on fiduciary responsibility in 29 C.F.R. § 2509.75-8(D-2, 3), on which the court purported to rely; its 1977 initial claims-handling and review of denied claims regulations in § 2560.503-1; § 503 of ERISA, which describes the ERISA claims review fiduciary; the plan asset and bonding rules in § 412(a), which make a clear distinction between "[e]very fiduciary of an employee benefit plan," and "every person who handles funds or other property of such a plan" ("plan officials"), who must be bonded; and the bonding regulations in 29 C.F.R. § 2580.412-4 and -6.

The questions and answers clarify the definition of "fiduciary" by allowing a contract service-provider to know in advance that it has a broad "safe-harbor" from fiduciary status if it merely performs "administrative" and "purely ministerial functions," such as "[*a*]*pplication* of rules determining eligibility for participation or benefits," "[c]alculation of benefits," and "[m]aking recommendations to others for decisions with respect to plan administration," under a "framework of . . . rules . . ." established by another party. (Emphasis added). In the "safe-harbor," the

Department of Labor accurately summarized in 11 broad categories the typical functions of contract service-providers, clarifying that these business activities will be non-fiduciary as long as they are performed under the plan's existing rules. The decision effectively destroys the intentionally broad shelter of the "safe-harbor" because every service-provider is required to make decisions, and uses some judgment and discretion, in applying the plan's eligibility rules or making recommendations on plan administration. The decision thus works at counter-purpose to the "safe harbor," pushing the notion of "fiduciary" status so excessively that it picks up parties who merely perform administrative and ministerial tasks under plan rules. "Having to make a decision in the exercise of a ministerial duty does not rise to the level of discretion required to be an ERISA fiduciary." *Arizona State Carpenters Pension Trust Fund v. Citibank (Arizona)*, —— F.3d ——, —— (9th Cir. 1997), 1997 U.S. App. LEXIS 23587, *15.

The decision also disrupts a consistent, long-standing, common-sense interpretation of § 3(21)(A) by seven other circuits and the Department of Labor, one which carefully reconciles the statutory definition of fiduciary, the fiduciary claims review section, and the plan assets and bonding provisions. Innumerable employee benefit plans and contract service-providers use this "safe-harbor" in order to secure experienced and efficient plan administration. Within this framework and the procedures set out in the plans, the service-providers can assist the employers without having to get each action ratified. If this "safe-harbor" were not available, each employer would be forced to administer its own plan with its own employees, with a consequent loss in employee medical records privacy and claims-handling efficiency and expertise. The "safe-harbor" also provides "bright line" distinctions which strongly assist not only the advance-planning by employers and service-providers, but also the interest in judicial economy, as shown in its embrace by seven other circuits.

Additionally, the decision will also make it very difficult, if not impossible, for many plans to continue using cost-effective, experienced third-party administrators or other outside claims-handling agents, including Blue Cross/Blue Shield organizations. As accurately summarized in F.A. BRODIE & J.D. GATTER, "When Are Claims Administrators ERISA Fiduciaries," PENSION & BENEFITS WEEK 7 (June 9, 1997), under the Ninth Circuit's decision "a claims administrator may avoid ERISA fiduciary liability only by declining to exercise *any* discretion in administering the plan—*a severe restriction of the service provider's function that may be unacceptable to plan sponsors*" (emphasis added). All of this conflict and litigation over an issue of "fiduciary" status already decided by the "safe-harbor" rule will increase plan transaction and litigation costs which, in turn, will ultimately require employers to reduce benefits or possibly even eliminate them altogether. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 13 (1987). This will cut across the grain of the "strong public interest in encouraging the formation . . . of employee benefit plans," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

2. *A Party Does Not Become a "Fiduciary" Automatically by Handling Plan Money and Having Check-Writing Authority.*

By holding that a party which handles plan money or has check-writing authority to pay benefits under the plan's terms automatically becomes a "fiduciary," the Ninth Circuit's decision once again touches every employee benefit plan but fails to read the ERISA statute as a whole. The decision is directly contrary to the plain language of the ERISA section governing the handling of plan assets and bonding. Section 412(a) of ERISA, 29 U.S.C. § 1112(a), which the court ignored, carves a clear-cut distinction between (1) "[e]very fiduciary of an employee benefit plan," and (2) "every person who handles funds or other property of such a plan" (termed by statute "plan officials"), who are subject to bonding requirements but are not fidu-

ciaries. The Department of Labor's bonding regulations track this statutory distinction and include, as "plan officials," individuals who pay claims and have check-writing authority over plan assets, and who are in a position to cause loss to a plan through fraud or dishonesty. 29 C.F.R. § 2580.412-4 and -6. In addition, the 1975 questions and answers explain that while an individual engaged in initial claims-processing may be "subject to [ERISA's] bonding requirements" if it handles funds or other property of the plan," it is *not* a "plan fiduciary" if it performs the ministerial duties specified therein. § 2509.75-8(D-2). The decision also conflicts with the law in other circuits, discussed below. Furthermore, the legal situation envisioned by the Ninth Circuit was not even within the realm of possibilities allowed by ERISA. The statutory sections governing the allocation of fiduciary responsibility not only require that any allocations be contained in the written plan instrument, but forbid a "named" fiduciary, such as IT Corp., from delegating to anyone other than an investment manager the authority or discretion to manage or control plan assets. §§ 402(a)(1), 405(c)(1) of ERISA; 29 C.F.R. § 2509.75-8(FR-15); D. BACON, S. PRATER, D. TUCKER, EMPLOYEE BENEFITS GUIDE § 7.04[6] (Matthew Bender & Co. 1996).

3. *The Ninth Circuit's Decision Will Have Significant Adverse Impacts on Plans.*

The Ninth Circuit's decision not only clashes with the overall structure and logic of the statute and its regulations, but throws concepts of administrative agency expertise and judicial economy to the winds. In addition, it will encourage forum shopping especially in the case of large national plans. In particular, suits in which a plaintiff seeks a fiduciary remedy against a contract service-provider will be brought in the Ninth Circuit. The decision, moreover, will engender major confusion across the country for employers small and large, especially for those with nationwide operations. It will adversely impact not only all parties providing administrative services for ERISA plans,

most of which have the initial claims-handling and payment done by someone *other* than the plan sponsor, but also countless bonded "plan officials" and Taft-Hartley trust employees who handle plan assets or have check-writing authority. For example, over 159 million individuals are covered by private sector employer-sponsored health care plans,[2] and for 91% of these plans, some portion of claims-handling and payment is performed for reasons of economy and expertise by parties other than the employers—such as third-party administrators, Blue Cross/Blue Shield plans and commercial insurers.[3] Many of these plans, moreover, are multi-state in operation. This Court's review is necessary to resolve the conflict among the circuits on the important, recurring issues of whether ERISA's definition of "fiduciary" encompasses service-providers merely performing initial claims-handling and payment pursuant to plan rules, and bonded "plans officials" who handle plan assets or have check-writing authority within those rules.

I. THE NINTH CIRCUIT'S DECISION THAT A PARTY MERELY PERFORMING INITIAL CLAIMS-PROCESSING AND PAYMENT IS A FIDUCIARY SHARPLY DEPARTS FROM THE CORRECT, COMMON-SENSE RULE FOLLOWED BY SEVEN OTHER CIRCUITS.

A. The Court Below Incorrectly Imposed Fiduciary Status on Parties Merely Engaged in Administrative, Ministerial Claims Activities.

Until the Ninth Circuit's recent decision, it was well-settled that the business of initial claims-handling and payment for an ERISA plan—as distinguished from the fiduciary review procedure for denied claims—was *not* an ERISA fiduciary function. *See* § 503 of ERISA, 29 U.S.C. § 1133 (the only ERISA section imposing fiduciary duties

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[2] STATISTICAL ABSTRACT OF THE UNITED STATES, p. 120 (116th ed. 1996).

[3] 1996 FOSTER HIGGINS NATIONAL SURVEY OF EMPLOYER-SPONSORED HEALTH PLANS, 18-19 ("FOSTER HIGGINS SURVEY").

in the claims area, but doing so solely with respect to a party designated by the plan to conduct the ERISA review procedure for *denied* claims); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143-44 (1985) (carefully observing that ERISA's "FIDUCIARY RESPONSIBILITY" provisions are contained in Part 4 of Title 1 of ERISA, whereas the claims provisions are contained in Part 5, "ADMINISTRATION AND ENFORCEMENT," with fiduciary responsibility for claims set forth in § 503 dealing with the review of "*denied*" claims). Similarly, the Department of Labor's 1975 questions and answers state that in contrast to "functions described in section 3(21)(A) of the Act," specified initial claims-processing functions, including "[a]pplication of rules determining eligibility for participation or benefits," are "administrative" and "purely ministerial" functions *outside of fiduciary status* if performed within a framework of rules established by another party. 29 C.F.R. § 2509.75-8(D-2). The Department's 1977 claims regulations likewise distinguish between initial claims-processing and payment, which are *non-fiduciary* in nature, and the fiduciary review procedure for *denied* claims. § 2560.503-1.

In addition, as discussed below, numerous other federal appellate courts, following the Department of Labor's lead, have given a common-sense, consistent interpretation to § 3(21)(A), holding that a broad range of initial claims-processing and check-writing activities is *outside* of ERISA fiduciary status if performed within a framework of plan rules. *See* M.J. CANAN & W.D. MITCHELL, EMPLOYEE FRINGE AND WELFARE BENEFIT PLANS § 2.3 (West Publishing Co. 1996) ("Other circuits have reached similar results" to *Kyle*); S.P. SEROTA, ERISA FIDUCIARY LAW, p. 153 (Bureau of National Affairs 1995) (insurers have been held not to be fiduciaries where their duties were "purely ministerial or where they had some discretion . . . but the ultimate authority . . . lay with the employer or the Named Fiduciary"); R. J. COOKE, ERISA PRACTICE AND PROCEDURE § 6.2 (Shepard's/McGraw Hill 2d Ed.

1996); EMPLOYEE BENEFITS GUIDE, *supra*, § 7.02[4][b], [d].

The Department of Labor's 1975 questions and answers, purportedly relied on by the Ninth Circuit, clarify that ERISA provides a wide "safe-harbor" from fiduciary status for contract service-providers. The questions and answers address those individuals who have no power to decide plan policy but merely perform broad ranges of initial claims-handling and payment activities, including the "[a]pplication of rules determining eligibility for participation or benefits," "[c]alculation of benefits," and "[m]aking recommendations to others for decisions with respect to plan administration," within a "framework of policies, interpretations, rules, practices and procedures made by other[s]." Apart from a straightforward benefit computation, *none* of the activities described by the Department involve something as simple and mechanical as typing a treatment code and provider identification onto a computer screen, a nonfiduciary, non-decision making task referred to by the Ninth Circuit. Instead, all of these activities, which are functions that must be performed for every plan, require the exercise of judgment and discretion in *applying* plan rules or making recommendations on plan administration. The Department properly described these nonfiduciary, everyday claims-handling and payment activities as "administrative" and "purely ministerial functions," carefully distinguishing them from what it referred to as "functions described in section 3(21)(A) of the Act." *Id.* It stated that such a party "is not a fiduciary because [it] does not have discretionary authority or discretionary control respecting management of the plan, [and] does not exercise any authority or control respecting management or disposition of the assets of the plan" within the meaning of § 3(21)(A). *Id.*

The Department of Labor thus acknowledged an important distinction, which eluded the court below, between a person, such as the Plan Administrator, to whom the plan has granted the power to make binding decisions as to *how* it should be interpreted, and contract service-

providers who later merely *apply* the plan's eligibility rules, within the existing framework of policies and interpretations, in determining participation rights and entitlement to benefits. While the latter class of persons may be called upon to exercise judgment and discretion, their decisions are limited to applying the *existing* eligibility rules on a case-by-case basis. Common sense and the questions and answers jointly establish that this type of day-to-day, administrative, purely ministerial decision-making, performed within a framework of plan rules, does not render these persons fiduciaries.

The Department of Labor thus specified for every plan very broad, precisely-defined contours for the initial claims-handling agent's "safe-harbor," enabling parties to gauge accurately, in advance, whether 11 categories of claims and payment activities will be nonfiduciary even though they may require bonding. This "safe-harbor" has allowed employers, Taft-Hartley trust employees, and contract service-providers to predetermine their respective roles and legal responsibilities within the plan's rules. It has also granted them a large measure of protection by allowing them to decline to enter into a contractual arrangement which will produce fiduciary status or to obtain, if necessary, professional or fiduciary liability insurance or appropriate indemnification agreements.

Lastly, as shown above, IT Corp., not General American, was the "named" fiduciary and had the sole "authority to . . . interpret . . . the Plan," serving both as Plan Administrator and ERISA claims review fiduciary. No fiduciary duty was ever delegated to General American, nor any power to interpret or construe the Plan. Furthermore, no dispute over plan interpretation existed in this case, a point established by the complaint itself;[4] there

[4] *None* of the district court pleadings alleged a dispute over plan interpretation. The complaint merely alleged that General American "failed to verify the eligibility" of a child to participate in the Plan. App. at 19a. There was no disagreement as to whether the child met the Plan's "late enrollee" requirement. Even had there been such a disagreement, it would only be a disagreement as to how

was only an alleged failure to verify eligibility. Moreover, this was an alleged failure to perform what the Department of Labor has characterized as a nonfiduciary, "administrative" and "purely ministerial" function outside of the "functions described in § 3(21)(A) of the Act." "[T]he discretionary role needed to support fiduciary status must be more than a *theoretical contrivance.*" *Useden v. Acker*, 947 F.2d 1563, 1574 (11th Cir. 1991) (emphasis added), *cert. denied*, 508 U.S. 959 (1993). Here, there is *not* even a "theoretical contrivance." The *exercise* of fiduciary responsibility is an express requirement for imposing fiduciary liability even on a party which is a fiduciary but is *not* a "named" fiduciary, another key point ignored by the Ninth Circuit. 29 C.F.R. § 2909.75-8 (FR-16) ("a fiduciary . . . who is not a named fiduciary is a fiduciary *only* to the extent that he or she *performs* one or more of the functions described in section 3(21)(A) of the Act") (emphasis added); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1223, 1325 (9th Cir. 1985) (*per curiam*).

B. The Decision Conflicts With Decisions in All Other Circuits Which Have Considered the Issue.

Demonstrating the significance of the legal issue, at least seven other circuits have recently considered whether a third-party administrator, insurance company, or employer merely performing the business of initial claims-handling and check-writing, and applying the plan's eligibility rules, is a "fiduciary" under § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). A number of these cases have involved commonplace plan provisions requiring the service-provider to refer disputed claims to the employer, which was given the authority to resolve all disputed claims. While several of these decisions including *Kyle, supra*, have involved a third-party administrator's alleged error in paying uncovered claims, it is well-settled that a person who is not a fiduciary does not become one by

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to *apply* the Plan's rules determining eligibility to a specific fact situation, and thus General American still would not be a fiduciary under the questions and answers.

negligently performing his or her duties, *Kyle, supra*, *Custer v. Sweeney*, 89 F.3d 1156, 1162 (4th Cir. 1996), *Nieto v. Ecker*, 845 F.2d 868, 870-71 (9th Cir. 1988), or even by performing an act outside of those duties, *O'Toole v. Arlington Trust Co.*, 681 F.2d 94, 96-7 (1st Cir. 1982). *All* of the decisions in these seven circuits have rejected fiduciary status.[5] Although the claims-processing and payment agent may require bonding, it is only a fiduciary where it has "authority to resolve all disputes regarding coverage," and is therefore the claims review fiduciary under § 503 of ERISA, 29 U.S.C. § 1133. *Libby-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. Of Ohio*, 982 F.2d 1031, 1032, 1035 (6th Cir.), *cert. denied*, 510 U.S. 819 (1993).

Similar to the district court, all of the circuits which have considered the issue have followed the plain, common-sense meaning of the Department of Labor's 1975 questions and answers and § 503 of ERISA, holding that such parties are *not* fiduciaries under ERISA. *See Santana v. Deluxe Corp.*, 920 F. Supp. 249, 254 (D. Mass. 1996) ("where an employee benefit plan has contracted with a third party to provide claims-processing and other administration services to the plan, but has retained discretion to decide disputed claims, courts have universally ruled that the service provider is not a fiduciary of the plan").

A primary example of this rule is *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 290 (11th Cir. 1989). In *Baker*, the Eleventh Circuit held that an

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[5] The Ninth Circuit itself previously rejected fiduciary status not only in *Kyle, supra*, but also in *Gelardi*, 761 F.2d at 1325 (a third-party administrator was not a fiduciary because it performed "only administrative functions, processing claims within a framework of . . . rules established by others"), and *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 415, 418 (9th Cir. 1990) (an insurer serving as "initial claims-handling agent" was not a fiduciary; it "handled the initial review and investigation of claims, the initial determination of eligibility for benefits under the rules contained in the plan, and the calculation and payment of benefits").

insurance company performing claims services for a self-funded plan was *not* an ERISA fiduciary where it "processed claims and disbursed benefit payments pursuant to the Plan terms under an administrative services agreement with [the employer] which reserved the right to review any and all claims denials." The employer "did no more than 'rent' the [insurer's] claims-processing department." *Id.* at 290. The court explained that the " 'ability to make policy decisions *outside* of a preexisting or separate framework of policies, practices and procedures' determines ERISA fiduciary status" (emphasis added) (citation omitted). *Id.* It held that the insurer did not become a " 'fiduciary' simply by performing administrative functions and claims-processing within a framework of rules established by an employer . . . especially if, as in this case, the claims processor has not been granted the authority to review benefit denials and make the ultimate decisions regarding eligibility." *Id.*

In addition, the Second, Third, Fourth, Sixth, Seventh and Eighth Circuits have held that contract service-providers, insurance companies, or employers merely performing initial claims-handling and payment are *not* ERISA "fiduciaries" where they are required to apply the plan's eligibility rules.

Second Circuit. *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 21 (2d Cir. 1996) (even an employer was not a fiduciary when it improperly verified and guaranteed eligibility of a non-employee to participate in a health and welfare trust, thereby causing a loss to the trust. Under the Department of Labor's questions and answers, "the performance of ministerial functions includes . . . the determination of eligibility for participation or benefits," and a person performing these functions is not a fiduciary). *See also Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir. 1987) (non-fiduciary "ministerial functions include the *application of rules determining eligibility for participation*") (emphasis added).

Third Circuit. *Confer v. Custom Engineering Co.*, 952 F.2d 34, 39 (3d Cir. 1991) (a third-party administrator

"whose responsibilities included . . . handling claims," was not a fiduciary. "[D]iscretionary authority, responsibility or control is a prerequisite to fiduciary status;" "[p]ersons who perform purely ministerial tasks, such as claims-processing and calculation, cannot be fiduciaries because they do not have discretionary roles"; the third-party administrator "had *an obligation to follow the written plan instrument*") (emphasis added).

Fourth Circuit. *HealthSouth Rehabilitation Hosp. v. American Nat. Red Cross*, 101 F.3d 1005, 1007-9 (4th Cir. 1996) (an insurance company which "provides administrative and ministerial services" to an employer's self-funded plan "pursuant to a contract," and has "the authority to make determinations on behalf of [the employer] with respect to benefit payments . . . and to pay out those benefits, subject to [the employer's] reserved right to modify any such determination," was *not* an ERISA fiduciary. "Any discretionary authority over administration of the Plan rested solely with [the employer]"), *cert. denied*, 117 S.Ct. 2432 (1997). *See also Haidle v. Chippenham Hosp., Inc.*, 855 F. Supp. 127, 132-33 (E.D.Va. 1994) (a service-provider was *not* an ERISA fiduciary where the employer delegated to it "authority to make [benefit] determinations on [its] behalf . . . under the Plan and to pay such benefits, subject, however, to a right of [the employer] to review and modify any such determination." The fact that the employer did not review or modify the decisions was not dispositive because *all* that the third-party administrator could do was to *implement* the plan policies).

Sixth Circuit. *Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 452-56 (6th Cir. 1991) (a third-party administrator for a self-funded plan was *not* a fiduciary where it was "merely a claims processor that pays claims in accordance with the terms of the plan," and the plan "reserved to [the employer] the right to construe the plan"; the employer was the Plan Administrator and "named" fiduciary).

Seventh Circuit. *Klosterman v. Western General Management, Inc.*, 32 F.3d 1119, 1124-25 (7th Cir. 1994) (a third-party administrator, as a matter of law, was *not* a fiduciary where it was responsible for "determining eligibility" and making "initial claims determinations" "in accordance with the [plan's] . . . standards," and the employer "retained the authority to make the ultimate decision in all doubtful or contested claims"; "when discretion truly was required, in questionable cases, the ultimate decision belonged to [the employer]"); *Harris Trust and Sav. Bank v. Provident Life and Acc. Ins. Co.*, 57 F.3d 608, 613 (7th Cir. 1995) (same); *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 127-29 (7th Cir. 1992) (a contract service-provider for a self-funded plan performing "the list of ministerial functions spelled out in [the "safe-harbor"] . . . was not a fiduciary." "ERISA makes the existence of discretion a sine qua non of fiduciary duty"). *See also Bromenn Healthcare v. Northwestern Nat. Life Ins. Co.*, 806 F. Supp. 799, 801, 804 (C.D. Ill. 1992) (a third-party administrator which agreed to provide services in accordance with the plan but allegedly overpaid claims was not an ERISA fiduciary; the employer, as Plan Administrator, retained all discretionary authority and control over the plan).

Eighth Circuit. *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 216-17 (8th Cir. 1993) (an insurance company, engaged in the initial processing and payment of claims, was not an ERISA fiduciary; it did "nothing more than perform its normal contractual claims handling function under a group policy." The insurer would be a fiduciary, however, if it were an ERISA claims review fiduciary).

Eleventh Circuit. *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987) (a third-party administrator for a self-funded plan was not a fiduciary where it performed "only claims-processing, investigatory, and record-keeping duties . . . under an independent contract with [the employer]"). *See also Useden*, 947 F.2d at 1574 ("[a]n entity [a lender to an ESOP] which assumes dis-

cretionary authority or control over plan assets will not be considered a fiduciary if that discretion is limited by a preexisting framework of policies, practices and procedures").

Accordingly, this Court should grant certiorari in order to correct the Ninth Circuit's serious statutory construction error and resolve the circuit conflict on the important, recurring issue—indeed, one involving every plan in America—as to whether a party merely performing initial claims-processing and payment under plan rules is a "fiduciary" pursuant to § 3(21)(A) of ERISA.

C. The Decision Ignores a Key Distinction Between Initial Claims-Handling and the Fiduciary Review of Denied Claims—the Only Fiduciary Function in the Claims Area.

The Ninth Circuit's decision as to initial claims-handling and payment under plan rules also ignores a central distinction, for every plan, between nonfiduciary initial claims-processing and payment and the *fiduciary* review procedure for denied claims, which is the only fiduciary function in the claims area. As recognized by the Department of Labor and seven other circuits, the great weight of ERISA's fiduciary responsibility and personal liability provisions in § 409(a), 29 U.S.C. § 1109(a), is *not* triggered by a contract service-provider's merely performing initial claims-handling and payment under a framework of plan rules.

A key part of the Department of Labor's 1975 questions and answers, misread by the court, explains exactly *when* fiduciary status arises in the claims context. The questions and answers specify that the "safe-harbor" is left, and the "fiduciary" sail is raised, when the "*plan* . . . designate[s] as a "*benefit supervisor*" a *plan employee* who has the "*final* authority to authorize or disallow benefit payments in cases where a *dispute exists* as to the *interpretation* of plan provisions relating to eligibility for benefits." 29 C.F.R. § 2509.75-8 (D-3) (emphasis added). This is the only reference in D-3 to a fiduciary role in the claims area. The Department's 1977 claims

regulations establish that the *only* fiduciary claims function is the review procedure for denied claims (§ 2560.503-1); this is in harmony with the earlier questions and answers.

There is a *stark absence* in the questions and answers or regulations of *any* indication that a contract service-provider which merely performs initial claims-processing and payment under plan rules is an ERISA fiduciary. Far to the contrary, the initial claims-processing and payment procedures spelled out in the regulations are all administrative in nature, a point emphasized by the fact that the Department even provided specific time frames and programmed responses for all claims actions. Second, the regulations demonstrate that the plan supervisor with "final authority" referred to in the questions and answers two years earlier is an ERISA claims review fiduciary as defined in § 503 of ERISA, 29 U.S.C. § 1133. Section 503 requires "*every* employee benefit plan" to provide participants with adequate written notice of claim denials, and to "afford a reasonable opportunity . . . for a full and fair review by the *appropriate named fiduciary* of the decision denying the claim" (emphasis added). Similarly, the regulations specify that *every plan* is to "*designate*[ ]" a "named fiduciary" to review and make decisions on claim denials. 29 C.F.R. § 2560.503-1(g). The 1975 questions and answers speak in short-hand terms about the plan's designating a supervisor to have "*final authority*" over disputed claims because *no* regulations had yet been issued on § 503. The questions and answers, however, plainly refer to a supervisory employee, designated by the plan, who would *now* be considered the "named" fiduciary designated by the plan to conduct the review procedure under § 503. Indeed, the only dispute over benefit eligibility could be between a claimant and the plan, and by statute there could be no "final authority" beyond the fiduciary review procedure mandated by § 503.

In summary, all of the other courts of appeals which have addressed this issue acknowledge the critical, common-sense distinction between the nonfiduciary function of merely performing *initial* claims-processing and pay-

ment under plan rules, and the fiduciary review procedure for *denied* claims, a distinction that is carved in the statute (§ 503), the 1975 questions and answers, and the 1977 claims regulations. In addition to creating a circuit conflict, the Ninth Circuit's decision will trigger endless controversy and litigation over what was, and was not, a "fiduciary" function in initial claims-processing and payment, which is exactly the conundrum that the deliberately wide "safe-harbor" was designed to avoid. Further, if as may occur, some employers will be required to take "in house" the claims-processing and payment functions for self-funded plans because contract service-providers raise fees or refuse to serve as fiduciaries, the result will be the loss of employee privacy interests in medical records and a loss of claims-handling efficiency and expertise.

II. THE NINTH CIRCUIT'S DECISION THAT A PARTY WHICH HANDLES PLAN ASSETS OR HAS CHECK-WRITING AUTHORITY AUTOMATICALLY BECOMES A FIDUCIARY CONFLICTS WITH THE PLAIN LANGUAGE OF ERISA AND THE LAW IN OTHER CIRCUITS.

The Ninth Circuit also significantly erred in construing ERISA's definition of "fiduciary" in § 3(21)(A), 29 U.S.C. § 1002(21)(A), so broadly as to automatically include anyone who handles plan money, or has check-writing authority, under the plan's rules, and who may require bonding to protect the plan. Similar to the first issue, this question of statutory construction is an exceptionally important federal issue touching every plan in America, one with a need for national unformity.

The Ninth Circuit cited § 3(21)(A), which states, in part, that a party is a "fiduciary" "to the extent" it "exercises any authority or control respecting management [of a plan] or disposition of its assets." [6] This is *not* the only

[6] In addition, ERISA including § 3(21)(A) and § 415(a) should be read as a whole. The word "discretionary" is used a number of times in § 3(21)(A), and the second of the two phrases in subsection (i), "exercises any authority or control respecting management or disposition of its assets," should be read as *discretionary* "author-

ERISA section which deals with plan assets or fiduciary status, however. Once again, the Ninth Circuit was blind to other pertinent parts of the statute and regulations.

The decision clashes with the plain meaning of ERISA's *specific*, carefully-tailored statutory provision which governs the handling of plan assets and bonding. Section 412(a) of ERISA, 29 U.S.C. § 1112(a), precisely distinguishes between "[e]very fiduciary of an employee benefit plan" and "every person who handles funds or other property of such a plan" and who must be bonded, the latter being termed by statute "plan officials." Not only adhering to the statutory distinction between "fiduciaries" and "plan officials," the Department of Labor's bonding regulations specify that this distinction covers the claims payment area by stating that "funds or other property of such plan" encompass "*all* property which is used or may be used as a source for the *payment of benefits* to plan participants," and include within the bonding requirement "any person with the *power to sign or endorse* checks" (emphasis added). 29 C.F.R. § 2580.412-4 and -6. As indicated, the Department's 1975 questions and answers explain that a party who performs the claims payment tasks outlined in the "safe-harbor," and "*handles funds or other property of the plan*," is "*not* . . . a *plan fiduciary*" but is subject to [ERISA's] *bonding* requirements." § 2509.75-8 (D-2) (emphasis added). The precise language of these statutory and regulatory provisions demon-

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ity or control." In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 (1985), this Court, in construing § 409(a), held that the last of three phrases, "such other equitable or remedial relief as the court may deem appropriate," should not be divorced from context but must be read as limited to relief "for a plan" notwithstanding that relief for a "plan" was referred to in the first two phrases but not the third. The Court disapproved a "blue pencil" method of statutory interpretation that "impermissibly ignores the relevant context in which statutory language subsists." *Id.* at 141-42. The same is true for § 3(21)(A). As stated by Judge Posner in *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992), "ERISA makes the existence of discretion a sine qua non of fiduciary duty."

strates that Congress did not intend that every person who handles plan funds or has check-writing authority to pay benefits would be a fiduciary.

Furthermore, as indicated above, Congress *forbids* the very situation envisioned by the Ninth Circuit. Under the Plan, IT Corp. as Plan Administrator had the *sole* "authority to control and manage [its] operation and administration," except to the extent that the Plan's written terms allocated fiduciary responsibility to another party (which they did not). § 402(a)(1), (b)(2) of ERISA, 29 U.S.C. § 1102(a)(1), (b)(2). Moreover, ERISA barred the Plan Administrator from allocating any power to "manage or control the assets of the plan" to anyone other than an investment manager. § 405(c)(1), 29 U.S.C. § 1105(c)(1). General American not being an investment manager, and the Plan not allocating such power to it in any event, IT Corp. necessarily retained all discretionary authority to manage or control plan assets. § 405(c)(1) of ERISA; 29 C.F.R. § 2509.75-8 (FR-15); *see also Walker v. National City Bank of Minneapolis*, 18 F.3d 630, 633 (8th Cir. 1994).

The Ninth Circuit's hyper-literal reading of § 3(21)(A) of ERISA, coupled with its complete disregard of §§ 402, 405, 503 and 412(a), not only conflicts with the architecture and logic of the statute and its regulations, but clashes with the law in other circuits. In *Geller v. County Line Auto Sales*, 86 F.3d 18, 21 (2d Cir. 1996), the court held that even an employer (which ordinarily would be a fiduciary almost automatically) that improperly verified and guaranteed eligibility of a non-employee to participate in a health and welfare trust, thereby causing a loss to the trust, was not a fiduciary. Similarly, in *HealthSouth Rehabilitation Hosp. v. American Nat. Red Cross*, 101 F.3d 1005, 1007, 1009 (4th Cir. 1996), the court held that an insurance company was not a fiduciary where it "provide[d] —administrative and ministerial services" and paid benefits "pursuant to a contract" but was

"subject to [the employer's] reserved right to modify any [benefit] determination." [7]

This Court recently pointed out that even the *broadest* sections of ERISA cannot be read with "*uncritical literalism.*" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1996) (construing the preemption clause in § 514(a), 29 U.S.C. § 1144(a)) (emphasis added). Instead, it held that the *entire* statute must be read logically and as a whole. *Id.*; *see also Crandon v. U.S.*, 494 U.S. 152, 158 (1990). The same is true here: § 3(21)(A) cannot be read without §§ 402, 405, 503 or 412(a), which is exactly what the Ninth Circuit did. In *Nieto v. Ecker*, 845 F.2d 868, 870-71 (9th Cir. 1988), Judge Kozinski correctly observed that ERISA's definition of "fiduciary" could *not* be read in an unduly literal manner to include *anyone* who had authority or control over plan assets. If the rule were otherwise, he wrote, "anyone performing services for an ERISA plan, be it an attorney, an accountant, a security guard or a janitor—would be rendered a fiduciary insofar as he exercised some control over trust assets and through negligence or dishonesty jeopardized those assets." *Id.* The Eleventh Circuit reached exactly the same common-sense conclusion in *Useden v. Acker*, 947 F.2d 1563, 1574 (11th Cir. 1991) (a lender to an ESOP is not an ERISA fiduciary despite its right to dispose of the stock pledged as collateral), *cert. denied*, 508 U.S. 959 (1993); *see also Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1993) (an attorney who handled settlement proceeds which were plan assets was not an ERISA fiduciary). Judge Kozinski and the Eleventh Circuit were manifestly correct in not applying an illogical or overly literal interpretation to § 3(21)(A), which is only *one* of ERISA's provisions dealing with plan assets and fiduciaries.

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[7] *See also Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 452-56 (6th Cir. 1991); *Baker v. Big Star Division of the Grand Union Co.*, 893 F.2d 288, 290 (11th Cir. 1990); *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 39 (3d Cir. 1991).

In sum, as a matter of statutory construction the Ninth Circuit could *not* focus solely on § 3(21)(A) and ignore §§ 402, 405, 503 and 412(a), the bonding regulations or key provisions in the questions and answers, on the ground that they dictated a result contrary to the desired holding. In *Russell, supra*, this Court, in reversing an earlier Ninth Circuit decision on ERISA fiduciary liability, expressly disapproved the " 'blue pencil' method" of interpretation—"omitting all words not part of the clauses deemed pertinent to the task at hand." 473 U.S. at 142. This cardinal requirement that the ERISA statute must be read logically and as a whole remains valid in 1997.

Consequently, this Court should grant certiorari both to correct a significant statutory construction error in the Ninth Circuit's decision, one affecting every plan, and to settle a circuit conflict as to whether persons who handle plan assets or have check-writing authority under plan rules automatically becomes ERISA "fiduciaries."

III. THE DECISION BELOW, WHICH HAS AN IMPACT FAR BEYOND THE NINTH CIRCUIT, WARRANTS REVIEW BECAUSE IT OVERTURNS THE ACCEPTED DEFINITION OF "FIDUCIARY" FOR EVERY PLAN, THUS MAKING IT DIFFICULT FOR MILLIONS OF PLANS TO SECURE EXPERT CLAIMS-PROCESSING, AND SPURRING LITIGATION, ALL CONTRARY TO THE PUBLIC INTEREST.

The Ninth Circuit's decision warrants review not only because it is incorrect on two major points of statutory construction and conflicts with decisions in seven other circuits, but also because it will create enormous difficulty in the administration of ERISA welfare and pension plans and will spur needless litigation over issues of "fiduciary" status that Congress and the Department of Labor acted to resolve in the 1970's.

Just in terms of health care plans alone, in the United States there are an estimated 4.5 million employer-

sponsored plans.[8] These health care plans cover over 159 million individuals[9] and, for 91% of these plans, some portion of claims-handling and payment is performed for reasons of economy and expertise by parties other than the employers, such as contract service-providers, Blue Cross/Blue Shield plans and commercial insurers.[10] Virtually all of these plans and administrative services agreements utilize the Department of Labor's broad "safe-harbor" from fiduciary status. Many of these plans, moreover, are multistate in operation.

Congress had a plain vanilla choice when it enacted ERISA. It could have made both *initial* claims-handling and payment under plan rules, and the review procedure for *denied* claims, fiduciary responsibilities subject to personal liability and federal court litigation, or it could have made the former non-fiduciary and the latter fiduciary. Alternatively, it could have left the nation without a workable standard for determining "fiduciary" status in the claims context. Congress sensibly chose the middle option as demonstrated with striking clarity by § 503 of ERISA, the broad "safe-harbor" in the Department of Labor's 1975 questions and answers, the 1977 claims regulations, and the consistent, well-developed body of law in seven other circuits. Congress and the Department of Labor wisely decided to keep the initial claims-processing and payment phase of all ERISA plans simple, non-adversarial and nonfiduciary, but subject to ERISA's bonding requirements. Among other points, Congress and the administrative agency did not want every person unhappy with an initial error to be able to sue a contract service-provider for breach of contract or breach of fiduciary duty. These suits would only be one more item to "extend

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[8] ADMINISTRATION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, REPORT OF THE SECRETARY OF LABOR TO CONGRESS at *i* (1987).

[9] STATISTICAL ABSTRACT OF THE UNITED STATES, p. 120 (116 ed. 1996).

[10] FOSTER HIGGINS SURVEY, 18-19.

the delays and costs of all ERISA procedures." *Snow v. Standard Ins. Co.*, 87 F.3d 327, 333 (9th Cir. 1996).

Review is necessary because the Ninth Circuit's decision will have significant adverse impacts on (literally) millions of employee benefit plans across the country, welfare plans and pension plans alike. First, the decision touches all plans and will make it extremely difficult and expensive, if not impossible, for many plans to obtain cost-effective and experienced third-party administrators, including Blue Cross/Blue Shield organizations and commercial insurers. Under the decision, a party merely engaged in initial claims-processing and payment under the plan's rules exits the "safe-harbor" and becomes a "fiduciary" if it simply does what a machine cannot do: make an eligibility decision. It may avoid ERISA fiduciary liability only by "declining to exercise *any* discretion in administering the plan—*a severe restriction of the service provider's function that may be unacceptable to plan sponsors.*" [11] Without these professional services, small and mid-range employers may not be able to provide self-funded employee benefit plans at all. Alternatively, if employers take the work "in house," there will be a corresponding loss of privacy in employee medical records, as well as a loss in claims-handling efficiency and expertise.

Second, the decision will encourage plaintiffs across the nation to use the Department of Labor's questions and answers—notwithstanding their clear text to the contrary —to convert every contract service-provider, Taft-Hartley trust employee, and bonded "plan official" into an ERISA fiduciary, attempting to saddle them with *personal* liability (§ 409(a), 29 U.S.C. § 1109(a)). This transaction-by-transaction litigation over the "fiduciary" status of parties who are in the broad "safe-harbor" will only serve to spike plan costs upwards which, in turn, will ultimately require employers to reduce benefits or possibly even elimi-

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[11] F.A. BRODIE & J.D. GATTER, "When Are Claims Administrators ERISA Fiduciaries," PENSION & BENEFITS WEEK 7 (June 9, 1997) (emphasis added).

nate certain benefits, *see Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 13 (1987). All of this is both senseless and contrary to the "strong public interest in encouraging the formation of employee benefit plans," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). The impact will be especially detrimental on health care plans that are already ensnared in ever-increasing cost spirals.

In summary, unless reversed the Ninth Circuit's decision will have adverse legal and financial impacts far outside the circuit, seriously eroding two of Congress's most important goals—encouraging the formation of ERISA plans and national uniformity of regulation. In destroying the contract service-provider's intentionally broad "safe-harbor," the decision will upend the common-sense distinction between nonfiduciary and fiduciary claims-processing and payment activities that is embodied in the statutory and regulatory scheme and honored by seven other circuits. It will encourage needless forum shopping and pointless litigation. In addition, it will hamper cost-effective, seasoned plan administration and medical records confidentiality, at the same time trampling the interest in judicial economy. Review by this Court therefore is essential not only to correct the decision's disconcerting errors in statutory construction, but to resolve a significant circuit conflict—one affecting every plan—over ERISA's definition of "fiduciary" in § 3(21)(A).

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant certiorari in this case.

Respectfully submitted,

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